



DEPARTMENT OF ENVIRONMENTAL SERVICES

Utilities and Environmental Policy Division

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Submitted Online (www.regulations.gov)

Water Docket

Environmental Protection Agency

Mailcode: 28221T

1200 Pennsylvania Ave., NW

Washington, DC 20460

Submitted by Email (vabaytmdl@dc.virginia.gov)

Department of Conservation and Recreation

Commonwealth of Virginia

203 Governor Street

Richmond, VA 23219

RE: EPA Water Docket ID No. EPA-R03-OW-2010-0736, Draft Total Maximum Daily Load ("TMDL") for the Chesapeake Bay; and Virginia Chesapeake Bay Watershed Implementation Plan ("WIP")

Dear Sir/Madam:

Thank you for the opportunity to comment on EPA's Draft TMDL for the Chesapeake Bay and Virginia's WIP. Arlington County, Virginia (Arlington County) owns and operates a municipal separate storm sewer system ("MS4") within the Chesapeake Bay watershed. This drainage system conveys and discharges stormwater pursuant to a state-issued National Pollutant Discharge Elimination System ("NPDES") permit.

Arlington County is committed to improving the health of its local streams, the Potomac River, and the Chesapeake Bay through our extensive watershed management programs. As such, we support the intent of the Chesapeake Bay cleanup effort and recognize the important work done by the Bay program to develop a plan to restore this significant natural resource. However, Arlington County has several concerns regarding the draft TMDL as described below.

We wish to begin by noting our general concurrence with the submitted comments of the Virginia Municipal Stormwater Association (VAMSA) and the Metropolitan Washington Council of Governments (COG) on the draft TMDL, which are hereby incorporated by reference as if fully set forth in this letter. We also wish to highlight several important points that outline the stormwater management challenges facing urban areas like Arlington County.

Feasibility and Cost

As we believe EPA and DCR are both well aware, there are significant questions about the feasibility of meeting the TMDL load reductions in all sectors, particularly for urban stormwater. We therefore wish to express our strong concerns about the future enforcement implications for MS4 permittees like Arlington County when local pollutant reductions almost inevitably fall short of Bay TMDL requirements.

Unfortunately, the dramatic hydrologic and hydraulic changes and resulting water quality impacts of nearly a century of development and drainage decisions that occurred in urban areas like Arlington County before the establishment of the NPDES stormwater program cannot be fully reversed. Arlington County recently initiated an extensive retrofitting program working with the nationally-recognized Center for Watershed Protection. However, the work to date indicates that retrofit potential and implementation timeframes will fall well short of Bay TMDL and MS4 permit requirements, even while providing important and needed water quality benefits.

Beyond the question of whether the TMDL is ultimately feasible are the significant capital and operating resources that will be required to expand local stormwater programs. Arlington County established a dedicated tax in 2008 that generates approximately \$7 million annually to fund a comprehensive stormwater program, half of which is dedicated to watershed management and water quality initiatives. The County's capital improvement program from fiscal years 2011 through 2016 contains \$3.4 million for stormwater retrofit projects and \$2.6 million for stream restoration projects. These represent significant financial commitments to local water quality protection and the goals of the Bay TMDL.

Based upon estimated retrofit costs and the lower end of the Bay TMDL urban retrofit requirement of 30 percent to 50 percent of urban land, we estimate it would cost Arlington approximately \$500 million through 2025, or \$33 million per year, to comply with the Bay TMDL's unrealistic implementation schedule. This would require roughly a five-fold increase in the County's stormwater tax rate, and these estimates do not include a significant increase in staff and related operating expenses that will be required for planning, design, project management, and maintenance.

Given the current economic situation, it is vital that EPA and DCR consider the total costs of any regulatory approach in order to develop a cost-effective and equitable strategy for improving the Bay. For example, in 2003, well before TMDLs and the limit-of-technology (LOT) being considered for permit limits to address the nutrient and other challenges of the Chesapeake Bay were established, Arlington County committed to a \$568 million capital investment to upgrade its wastewater treatment plant ("WWTP"). The WWTP recently completed the major components of this upgrade and is currently discharging below the LOT for total nitrogen of 3 mg/L (averaging approximately 2.3 mg/L since June 2010).

This highly successful capital project clearly illustrates Arlington County's commitment to reducing its contribution to the Bay's nutrient problem and meeting stringent regulatory requirements, but this extensive capital upgrade also resulted in substantial increases in the water and sewer rate for Arlington residents. This rate has increased 145 percent over an 8-year period, from \$4.58 per thousand gallons in FY 2002 to \$11.20 per thousand gallons in FY 2010.

Arlington County also established a dedicated 'stormwater tax' in FY 2008 at a rate of \$0.01 per \$100 of assessed real estate value to support an expanded stormwater management program. In FY 2010, this rate was raised to \$0.013 per \$100 of assessed real estate value.

In order to maximize the use of limited resources and minimize future financial burdens on Arlington County residents, Arlington supports a TMDL implementation framework that allows jurisdictions to address nutrient allocations among wastewater and stormwater sources within jurisdictional boundaries to achieve overall TMDL load allocations in the most cost-effective manner possible.

Statutory Authority

We understand the authority granted by the Clean Water Act to enforce water quality standards set for the Bay and its tidal tributaries. However, the regulatory framework for MS4 permits under the Clean Water Act is different than the framework EPA has more recently articulated for MS4 permits with the Bay TMDL and other TMDLs in the region and country.

Section 402.p.3.b.iii of the Clean Water Act (CWA) states that MS4 permits "shall require controls to reduce the discharge of pollutants to the **maximum extent practicable** [emphasis added]...." The plain language of the CWA applies this 'MEP' standard to MS4 permits, rather than a strict standard to comply with water quality criteria, as is the case with the Bay TMDL.

To date, MS4 permits have been administered by regulatory agencies in the region using the MEP standard. In contrast, EPA and some courts have reached a conclusion that the MEP standard does not apply to MS4 permits when water quality criteria are violated.

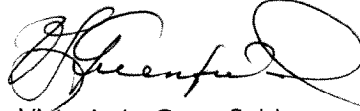
The statutory and regulatory basis for this interpretation is unclear at best and, at worst, is in direct conflict with the plain language of the Clean Water Act. We, therefore, have serious and ongoing questions about EPA's authority to enforce any standard other than the MEP standard for MS4 permits.

The consequences of EPA's interpretation of TMDL requirements for MS4 permits are real. It appears likely that the TMDL requirements will eventually result in enforcement actions by EPA against MS4 permittees in 2025, if not sooner, and trigger legal actions by permittees and the advocacy community or both.

Together with other jurisdictions and organizations, as reflected in the comments submitted by VAMSA and MWCOG, we strongly urge EPA and DCR to consider an MS4 permitting and enforcement approach for the Bay TMDL that supports municipal stormwater programs going farther than they have to date, but does not set up each MS4 permittee for failure. The focus of the Bay cleanup effort should be on tangible, substantial, and sustained work to restore the Bay, an equitable sharing of the responsibility for cleanup that applies to all sectors, and a realistic recognition that this effort will require an unprecedented level of federal, State, and local resources to be successful.

Our concern is that under the current draft TMDL, local governments, taxpayers, and others who are actively working to achieve water quality improvements under the Clean Water Act will be undermined by exposure to unrealistic requirements, as well as substantial legal and financial consequences of violating TMDL requirements currently under consideration by EPA. The proposed TMDL framework is not a realistic or sustainable path forward towards the goal of a healthy Bay that we all share.

Sincerely,

A handwritten signature in black ink, appearing to read 'V. Greenfield', with a large, stylized flourish at the end.

Victoria L. Greenfield
Director

Cc: Barbara Donnellan, County Manager
Greg Emanuel, Acting Director/DES
Jeff Harn/DES UEPD
Jason Papacosma/DES UEPD
Allan Rowley/DES UEPD
Larry Slattery/DES UEPD
Julie Massie/CAO